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In the Supreme Court of the United States

OCTOBER TERM 1982

COMMONWEALTH OF PENNSYLVANIA *et al.*,
Petitioners,

v.

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR
and
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief In Support Of Petition For Writ Of Certiorari Of The Greater Pittsburgh Chamber Of Commerce, The Greater Philadelphia Chamber Of Commerce, Associated Pennsylvania Constructors, Pennsylvania Asphalt Pavement Association, County Of Allegheny, City Of Pittsburgh, Pennsylvania State Council Of Carpenters, And Allegheny County Labor Council As *Amici Curiae*

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICI CURIAE*

The Greater Pittsburgh Chamber of Commerce, The Greater Philadelphia Chamber of Commerce, Associated Pennsylvania Constructors, Pennsylvania Asphalt Pavement Association, County of Allegheny, City of Pittsburgh, Pennsylvania State Council of Carpenters, and Allegheny County Labor Council respectfully submit this Brief as *amici curiae* in support of the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania*, 678 F.2d 470 (3d Cir. 1982), entered on May 21, 1982.

INTEREST OF THE *AMICI CURIAE*[1]

The *amici curiae* urge this Court to grant the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Third Circuit in *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania*, 678 F.2d 470 (3d Cir. 1982). In *Delaware Valley*, the Third Circuit affirmed the decision of the United States District Court for the Eastern District of Pennsylvania dated January 22, 1982, 533 F. Supp. 869, as amended February 18, 1982, 533 F. Supp. 885.

The district court below held the Commonwealth of Pennsylvania in contempt of court for failure to carry out the terms of a consent decree providing for implementation of an automobile emissions inspection and maintenance program (hereinafter "I/M program"). As an aspect of its contempt order, the district court also ordered the United States Secretary of Transportation not to approve any highway projects or to award any highway grants in the Pittsburgh and Philadelphia metropolitan areas unless the Secretary and the district court found such projects and grants to be related to safety, air quality, or mass transit. The Third Circuit affirmed the district court's contempt order.[2]

Amici curiae are a diverse group. The County of Allegheny is a governmental unit in the Commonwealth of Pennsylvania with a population of more than one million citizens and with more than 130 units of local government within its geographic confines. The City of Pittsburgh, located within the County, is a municipal corporation organized and existing under the laws of the Commonwealth of Pennsylvania.

The Greater Pittsburgh Chamber of Commerce and The Greater Philadelphia Chamber of Commerce are nonprofit associations representing the business and professional communities in the Pittsburgh and Philadelphia areas, respectively. Both work to establish and maintain cooperative and productive relations

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[1]Pursuant to Supreme Court Rule 36.1, *amici curiae* have obtained from all parties to this action their written consent to submit this Brief in Support of the Petition for Writ of Certiorari. Each consent is on file with the Clerk of this Court.

[2]A more complete statement of the case may be found in the Petition for Writ of Certiorari at page 5 *et seq.*

between the business community and the public sector with the hope of improving the economic well-being of their regions.

The Associated Pennsylvania Constructors is a nonprofit trade association whose members are contractors and suppliers involved in the construction of highways, bridges, and other public works in Pennsylvania. Members of the Associated Pennsylvania Constructors, representing about ninety percent of the active private contractors in Pennsylvania performing highway construction work, are responsible for the majority of construction and maintenance contracts awarded by the Pennsylvania Department of Transportation.

The members of the Pennsylvania Asphalt Pavement Association, a nonprofit trade association representing the producers of asphalt concrete in the Commonwealth of Pennsylvania, are also vitally concerned with highway construction in Pennsylvania. The Association represents the owners and operators of over eighty percent of the asphalt concrete plants in the Commonwealth, plants that account for most of the asphalt concrete produced in the state.

The Pennsylvania State Council of Carpenters represents 30,000 working men and women throughout the Commonwealth of Pennsylvania. Its members perform all carpentry-related work on highway construction in Pennsylvania. The Allegheny County Labor Council represents over 100,000 workers performing trades in and about Pittsburgh. Its members are involved in all phases of highway construction.

The *amici curiae* have a common, overriding interest in the orderly development and proper maintenance of the transportation networks in the ten affected counties within the Pittsburgh and Philadelphia metropolitan areas. Crucial to this common interest of *amici* is a workable system for funding and administering the state's highway construction efforts. The district court's contempt order, however, makes long-range, short-range, and intermediate planning for highway construction impossible because of the interposition of a federal judge as the key decision-maker in the funding and administering of highway construction in Pennsylvania.

Because of the district court's contempt order, the economic distress already experienced in the regions serviced by the affected

transportation systems will be further aggravated while the people living within those regions will suffer physically, economically, and socially. The individuals and organizations comprised by *amici* will experience much of this harm. Transportation supports the Pittsburgh and Philadelphia metropolitan economies; industry, manufacturing, commerce, and service trades are all highly dependent upon local highway systems. Moreover, people living in (or traveling through) the affected areas will find their personal and business travels less comfortable and less safe.

SUMMARY OF ARGUMENT

The Commonwealth's Petition for Writ of Certiorari should be granted for the following reasons:

(1) *The Third Circuit's decision conflicts with the decisions of four other circuits.* Sup. Ct. R. 17.1(a). The Second Circuit's decision in *New York State Ass'n for Retarded Children, Inc. v. Carey*, 631 F.2d 162 (2d Cir. 1980), is contrary to the Third Circuit's decision in *Delaware Valley*, yet the two cases are nearly identical factually. In *Carey*, a district court order holding the Governor of New York in contempt of court was reversed because it was the legislature, and not the governor, that could provide funding for measures designed to secure the constitutional rights of the mentally retarded. Moreover, contrary to the Third Circuit's decision, the First Circuit has ruled that the remedial powers of a federal court in ordering compliance with a consent decree to which a state is a party are limited to requiring that a state's executive branch officials exercise "best efforts". *Brewster v. Dukakis*, 675 F.2d 1 (1st Cir. 1982).

The decision currently under review interferes not only with the executive branch of a state, but also with its legislative branch. Contrary to a ruling by the Eighth Circuit, the order issued by the district court and affirmed by the Third Circuit unduly interferes with the Commonwealth's appropriations process. *Welsch v. Likins*, 550 F.2d 1122 (8th Cir. 1977). Further, the decisions below do not adopt the balancing-of-interests test enunciated by the Seventh Circuit in the similar case of *Gautreaux v. Romney*, 457 F.2d 124 (7th Cir. 1972). The lower courts' exercise of equitable power has failed to take into account the unnecessary harm

inflicted upon third parties such as *amici* and the possible worsening of the air quality in the affected areas caused by the judicial interruption in highway construction. The purpose of the district court's order could have been achieved through the use of less intrusive alternatives that would not have adversely affected third parties.

Finally, the lower courts have ignored the Constitution's express and exclusive delegation of power to Congress to decide when and under what circumstances federal highway funds will be granted or withheld. *State Highway Commission v. Volpe*, 479 F.2d 1099 (8th Cir. 1973). Instead, the district court has arrogated to itself power to approve commencement of all highway projects involving U.S. Department of Transportation funds in the Pittsburgh and Philadelphia metropolitan areas.

(2) *The Third Circuit's decision conflicts with a decision of this Court.* Sup. Ct. R. 17.1(c). In *Rizzo v. Goode*, 423 U.S. 362, 379 (1979), this Court made clear that "appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief." In the present case, however, the Third Circuit gave short shrift to federalism concerns, even though the briefs of appellants and *amici curiae* below stressed the national importance of the issue. The Third Circuit's refusal to acknowledge and adhere to the federalism concerns that underlay the decision in *Rizzo* has resulted in a federal judicial invasion into a sphere of state operational autonomy—highway construction.

(3) *The uneasy and uncertain relationship of a federal court's equitable power to the federalism and separation doctrines, an issue of vital national importance, needs to be settled by this Court.* Sup. Ct. R. 17.1(c) As both subsequent case law and various commentators make clear, the scope and meaning of *Rizzo* remain uncertain. This Court must provide guidance for the lower courts if uniformity and clarity of the law are to be achieved in an area of unsurpassed importance to our nation.

Amici curiae also believe that the contempt order violates the separation of powers doctrine. The federal courts below have invaded functions of the Commonwealth's executive and legislative branches, as well as those of the United States Congress.

ARGUMENT

I. THE THIRD CIRCUIT'S DECISION IS IN CONFLICT WITH THE DECISIONS OF FOUR OTHER CIRCUITS.

A. The Second Circuit Has Held That A Governor Cannot Be Held In Contempt Of Court For Failure to Provide Funding For A Review Panel Charged With Remedying Constitutional Violations.

The United States Court of Appeals for the Second Circuit has rendered a decision in a case whose material facts are virtually indistinguishable from those in the present case. *New York State Ass'n for Retarded Children, Inc. v. Carey*, 631 F.2d 162 (2d Cir. 1980). Because the differences between the cases are immaterial, the attempted distinctions drawn below are of little guidance to courts that must deal with similar circumstances in the future.

In *Carey*, state agencies and officials, including the Governor, agreed in a federal court proceeding to a consent judgment providing for measures that would secure the constitutional rights of mentally retarded residents at the Willowbrook Developmental Center on Staten Island. When the state legislature refused to provide funding for a review panel, as required under the consent judgment, the United States District Court for the Eastern District of New York held the Governor in contempt, even though he "acted entirely in good faith." *Id.* at 164.

The Second Circuit reversed, holding that although "a state cannot avoid the obligation of correcting the constitutional violations of its institutions simply by pleading fiscal inability," the question whether state funds will be expended remains "in the hands of citizens of the state, not in the hands of federal judges." *Id.* at 165. Under the New York State Constitution, the Governor was powerless to provide funding for the review panel absent express legislative authorization.

In the present case, the Third Circuit distinguished *Carey* by noting that the wording of "the consent judgment in [*Carey*] in fact only required the Governor to seek financing subject to any legislative approval that may be required." *Delaware Valley*, 678 F.2d at 476. But this is a distinction without a difference. First, it is indisputable that consent decrees are construed as contracts. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 238

(1975). And it is equally clear that, as a matter of law, the Pennsylvania General Assembly's power to withhold funding is an implicit term in any contract with the Commonwealth—even one affecting the balance of federal-state relations. *Shapp v. Sloan*, 480 Pa. 449, 473, 391 A.2d 595 (1978), *appeal dismissed sub nom. Thornburgh v. Casey*, 440 U.S. 942 (1979). Second, the Third Circuit simply ignored the political and institutional reality that the executive branch cannot force the legislature to act, for in the end, as the Second Circuit wrote in *Carey*, it is the legislature that "control[s] the purse-strings and determine[s] the priorities for the expenditure of State money." 631 F.2d at 166. *Compare* PA. CONST. art. III, §24.

B. The First Circuit Has Ruled That State Executive Branch Officials Can Be Held Only To "Best Efforts" To Obtain Funding for Federal Consent Decree Obligations.

Like *Carey*, *Brewster v. Dukakis*, 675 F.2d 1 (1st Cir. 1982), concerned violations of constitutional and statutory rights of the mentally disabled. The Commonwealth of Massachusetts, represented by various executive branch officials (including the Governor), agreed to a consent decree with provisions for the implementation of a comprehensive system of community mental health and retardation services. Two and one-half years later, the legislature appropriated five million dollars less than what the officials had requested for the programs. The district court, interpreting the decree, issued an injunctive order from which an appeal was taken.

The United States Court of Appeals for the First Circuit affirmed that part of the district court's order requiring the state officials to exert best efforts to secure funding before making any cuts in services: "Although the programmatic provisions of the consent decree are often phrased as mandatory obligations of the state, we must interpret the provision requiring best efforts to fund these obligations as an overriding provision that modifies the apparently mandatory nature of these obligations." *Id.* at 4. The First Circuit in effect held that "best efforts" constituted a ceiling on what the consent decree could require of the Massachusetts officials. No more should be expected of the Pennsylvania officials in the present case.

Other parts of the order in *Brewster*, such as a paragraph requiring the appellants "to develop, submit to bidding, contract and fund all community programs originally planned for FY '82," were vacated. In analyzing the district court's formation of a remedy, Chief Judge Coffin reasoned: "[T]he court cannot require appellants to go beyond what their good faith professional best efforts can reasonably be expected to accomplish." *Id.* at 5 (footnote omitted). In the instant case, Pennsylvania Governor Thornburgh certainly used his professional best efforts—for one thing, he vetoed H.B. 456, which prohibited funds for the I/M program—but, contrary to the Third Circuit's formalistic vision, he simply cannot control the votes of two hundred and fifty-three elected representatives and senators.[3]

C. The Eighth Circuit Has Ruled Against Federal Judicial Interference With A State's Appropriations Process.

The constitutional rights of the mentally retarded were again at stake in *Welsch v. Likins*, 550 F.2d 1122 (8th Cir. 1977). When the Minnesota Legislature failed to provide adequate funding to the Department of Public Welfare to carry out the district court's orders, the court enjoined the Commissioner of Administration and the Commissioner of Finance from complying with a provision of the Minnesota State Constitution and with eleven specific statutory provisions. "The obvious purpose of the order was to permit the Department of Public Welfare to comply with the earlier orders of the district court just as though the Minnesota Legislature had made appropriations adequate to permit compliance in accordance with normal Minnesota fiscal procedures." *Id.* at 1129.

The United States Court of Appeals for the Eighth Circuit held that the district court had overstepped its bounds:

> In this case we are dealing with the right of a sovereign state to manage and control its own financial affairs. *No right of a state is entitled to greater respect by the federal courts than the state's right to determine how revenues should be raised and how and for what purpose public funds should be expended.*

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[3]The Governor's veto of H.B. 456 was subsequently overriden.

> Conflicts between federal judicial power and state and local governments have arisen in the past and will doubtless arise again. But needless direct confrontations between a federal court and a state should be avoided, particularly in a field as delicate as the one here involved.

Id. at 1131-32 (emphasis added). By holding the Commonwealth in contempt, the lower courts have pushed this "confrontation" to the brink and have supplied the predicate for this Court's resolution of issues concerning "the right of a sovereign state to manage and control its own financial affairs." *Id.* As noted by the Pennsylvania Supreme Court in *Shapp v. Sloan*, 480 Pa. 449, 473, 391 A.2d 595, 607 (1978), *appeal dismissed sub nom. Thornburgh v. Casey*, 440 U.S. 942 (1979), "In the federal system the state retains its sovereign power over spending within the state, and under [the] Pennsylvania Constitution this sovereign power is to be exercised by the legislature." This "sovereign power" was assigned precious little weight by the courts below.

D. The Seventh Circuit's Balancing-Of-Interests Test Has Not Been Adopted By The Third Circuit.

In *Gautreaux v. Romney*, 457 F.2d 124 (7th Cir. 1972), the United States Court of Appeals for the Seventh Circuit had before it a district court order enjoining the defendant Secretary of the Department of Housing and Urban Development from releasing to the City of Chicago certain funds earmarked for the Model Cities Program. The lower court hoped to force the Chicago Housing Authority, the Chicago City Council, and the Mayor to make available low-cost public housing for low-income families.

Quoting *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971), the Seventh Circuit observed that "[i]n a Civil Rights case, the Court's task is 'to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.'" *Gautreaux*, 457 F.2d at 127. Thus, even when there are constitutional violations, a court must still balance all the interests involved before issuing an injunction. Here, there were no constitutional violations asserted against the Commonwealth but rather the claimed violation pertained exclusively to a consent decree. As a result of the district court's contempt order, millions of drivers will likely be faced with

increased congestion and hazardous conditions on a rapidly deteriorating highway infrastructure, jobs may be lost, and businesses may fail. Yet no balancing of interests is reflected in the decision of either the district court or the court of appeals.[4]

In *Gautreaux*, the Seventh Circuit also held it "improper for the District Court to threaten the termination of a program which was not tainted with discriminatory action in order to bring about a cure of a separate program which was found to have been so tainted." 457 F.2d at 127. Indeed, the same may be true here. In discussing §176(a) of the Clean Air Act, 42 U.S.C. §7506 (Supp. II 1978), the source of the "suggested remedy" imposed by the courts below, one commentator observed with respect to the sanction of withholding transportation funding: "Even within a nonattainment area, a particular new highway might not contribute to the problem; conceivably it could help by reducing congestion." Battle, *Transportation Controls Under the Clean Air Act—An Experience in (Un)Cooperative Federalism*, 15 LAND & WATER L.R. 1, 57 (1980). *See also* Affidavit of Gary C. Triplett, Petitioners' Application for Stay. Nor can *repairing* existing highways "contribute to the problem" sought to be corrected by the district court's order. Instead, travel would be made both safer and more comfortable for all motorists if the affected highway construction were permitted to proceed unimpeded.

E. The Holding Of The Eighth Circuit, That Only Congress Can Determine The Conditions Under Which Highway Funds Can Be Withheld, Has Been Ignored By The Third Circuit.

At issue in *State Highway Commission v. Volpe*, 479 F.2d 1099 (8th Cir. 1973), were contract controls imposed by the United States Secretary of Transportation. The controls, which deferred authority to obligate highway funds previously apportioned to Missouri under the Federal-Aid Highway Act of 1956, as amended, 23 U.S.C. §101, *et seq.* (1970), were in response to

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[4]Had the district court considered the consequences of its order, it may well have adopted an equally effective but less extreme remedy. For example, the court could have employed another "suggested remedy" from the Clean Air Act and ordered withholding of funds to the Commonwealth under §176(b) of the Act, 42 U.S.C. §7506(b) (Supp. II 1978). There is no indication in the opinions of the courts below that they even considered such a less extreme remedy.

President Johnson's proposals "to curb inflation and assure the stability of the economy." 479 F.2d at 1108.

The Eighth Circuit found no express or implied authority in the Federal-Aid Highway Act for the Secretary to withhold funding for the proffered reasons. It is the Congress that must determine under what circumstances funds can be withheld by virtue of the power to "establish... post roads" vested in it by Article I, §8 of the Constitution. The court explained:

> It seems reasonable to say that until and unless Congress acted under Article I, neither the Secretary nor anyone else within the Executive branch of the government could build a federally aided highway system. *The only branch of government which has the constitutional power to build roads is the only one which has the authority to dictate the terms under which the construction can be carried out.*

Id. at 1111 (emphasis added). As the courts below have candidly admitted, they have withheld funding for highway construction absent congressional authorization. *Delaware Valley*, 678 F.2d at 478; 533 F. Supp. at 887. Furthermore, the district court *added* its own conditions to the approval of funding awards. 533 F. Supp. at 885. In doing both, the lower courts have trampled upon the constitutional line that clearly separates the Congress, which can "establish... post roads," from the other two branches, which cannot.

II. THE THIRD CIRCUIT'S DECISION IS IN CONFLICT WITH THIS COURT'S DECISION IN *RIZZO v. GOODE*.

The district court below noted that it "was merely exercising its equitable discretion to fashion an appropriate coercive sanction for the defendants' contempt." *Delaware Valley*, 533 F. Supp. at 887. Yet both it and the Third Circuit took no account of the following admonition in *Rizzo v. Goode*, 423 U.S. 362, 378 (1976):

> [W]here... the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the "special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law." *Stefanelli v. Minard*, 342 U.S. 117,

120, 96 L. Ed. 138, 72 S. Ct. 118 (1951), quoted in *O'Shea v. Littleton*, 414 U.S., at 500, 38 L. Ed.2d 674, 94 S. Ct. 669.

This balance between federal and state power was given little more than lip service below. In *Delaware Valley*, the Third Circuit took care to point out that "those Commonwealth officials sitting in the General Assembly certainly are not incapable of insuring the Commonwealth's compliance," 678 F.2d at 476, and that "[a]ny harm resulting to the citizens of Pennsylvania from a lack of federal highway funds can easily be brought to an end by actions of their elected representatives in the state legislature." *Id.* at 478-79. In other words, the contempt of court order remains in effect until the state legislature does that which the federal courts have, in effect, ordered it to do. Such a posture on the part of the federal judiciary hardly gives the Commonwealth "the widest latitude in the 'dispatch of its own internal affairs'." *Rizzo*, 423 U.S. at 378-79 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896 (1961)).

Federalism is no empty concept, devoid of content. Justice Black spoke of "Our Federalism" as the

> notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Younger v. Harris, 401 U.S. 37, 44 (1971). This "comity," or respect, has not been accorded the Commonwealth. In a federalist system of government, "there is sensitivity to the legitimate interests of both State and National Governments." *Id.* Yet the lower courts have shown no sensitivity to Pennsylvania's executive branch officials, who have already exhibited their good faith and "best efforts," nor to the legislature, whose funding decision has been expressed in H.B. 456.

But beyond this somewhat intangible notion of comity, practical reasons dictate that the federalist balance be maintained. One noted jurist has observed:

> We must stand in awe and admiration of the decision of the Framers and of the success of the Supreme Court in

> fleshing it out—preventing one state from sitting in the way of others and endowing the central government with power to act on a national basis when Congress finds this to be warranted, *but leaving to the states the final decision on the bulk of day-to-day matters that can best be decided by those who are closest to them.*

Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019, 1034 (1977) (emphasis added). Yet the district court's order, affirmed by the Third Circuit, makes the Commonwealth's day-to-day, not to mention long-term, management and planning of highway construction considerably more difficult, if not impossible. Because of the district court's contempt order, the efforts of many parties working together will be lost. *See* Affidavit of Harvey Haack, Petitioner's Application for Stay.

The dangers of unnecessarily intrusive judicial supervision of state functions are well known. It has been observed that administrative injunctions of the sort at issue here

> are especially intrusive. They introduce a dimension of supervision and oversight not present with declaratory judgments or statutory injunctions. Administrative decrees typically embody standards of conduct so general as to acquire their meaning only in specific application to particular aspects of a defendant's conduct, and inject a court into the middle of ongoing social relationships that are neither easy to alter nor easy to understand. As a result, administrative injunctions involve close monitoring of a defendant's performance over long periods of time, continual intervention to increase the specificity and otherwise modify earlier decrees, and the creation of adjunct agencies to assist on the policing of performance.

Fiss, Dombrowski, 86 YALE L.J. 1103, 1148 (1977). The intrusiveness here is aptly described by what the Commonwealth calls a "judicial receivership". Petition for Writ of Certiorari at 26. *See also Delaware Valley*, 533 F. Supp. at 885 (setting forth the district court's requirements before projects may be approved or grants awarded in the affected areas).

The courts below have exceeded the proper scope of their authority. *Amici curiae* think the better rule is this: "Only when a federal program coopts the state's political processes by interfer-

ing with legislative and executive direction in a significant way should the courts have to intervene." Kaden, *Politics, Money and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 890 (1979). The courts below have inverted this rule, intervening not to avoid excessive federal interference with state governmental functions, but rather to "coopt the state's political processes."

III. THE UNCERTAIN RELATIONSHIP OF A FEDERAL COURT'S EQUITABLE POWER TO THE FEDERALISM AND SEPARATION DOCTRINES HAS GENERATED MUCH CONFUSION WHICH MUST BE RESOLVED BY THIS COURT.

A. The Scope And Meaning of *Rizzo* Are Unclear.

By granting the Commonwealth's Petition for Writ of Certiorari, this Court can do more than just address those issues of comity, autonomy, and intrusiveness ignored by the courts below. The Court can, in addition, remove the uncertainty that has been generated by *Rizzo's* concern with the federalist balance, an uncertainty reflected in both subsequent case law and in numerous commentaries.

The United States Court of Appeals for the Ninth Circuit has, for instance, refused to grant an injunction compelling a regional planning authority to repeal a land use ordinance and, in its place, to enact a new one. *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir. 1977), *aff'd in part and rev'd in part on other grounds*, 440 U.S. 391 (1979). The appellate court reasoned: "Principles of federalism counsel against such affirmative intrusion into the executive branch of an agency of state or local government." *Id.* at 1366 (citing *Rizzo*).

The Seventh Circuit, however, found no such affirmative intrusion in *Youakim v. Miller*, 562 F.2d 483 (7th Cir. 1977), *aff'd on other grounds*, 440 U.S. 125 (1979). The court upheld a district court order requiring the Illinois Department of Children and Family Services to promulgate new rules and regulations consistent with other aspects of the order. It said that *Rizzo* was inapposite because "[a]lthough the federal courts must be constantly mindful of the adjustment to be preserved between federal equitable power and state administration of its own law, they must, and do, retain power to enforce compliance with federal statutes." *Id.* at 491.

Nor are the commentators in accord. One finds *Rizzo* "suggest[ing] the development of new, but as yet uncertain, constraints on the availability of federal equitable relief." *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 58, 247 (1976) (footnote omitted). A second sees no such uncertainty in *Rizzo*: "[T]he emphasis in *Rizzo* is upon federal court respect for the integrity of local government institutional structures as an end in itself." Gelfand, *The Burger Court and The New Federalism: Preliminary Reflections on The Roles of Local Government Actors in The Political Dramas of The 1980's*, 21 B.C.L. REV. 763, 780 (1980) (footnote omitted).

In discussing *Rizzo* and *O'Shea v. Littleton*, 414 U.S. 488 (1974), one constitutional scholar described the challenge facing this Court: "[T]he relationship between federalism and equity is far too complex to be captured by analogies to the literally inapplicable *Younger* rules: to explain the relationship, *the Court will actually have to articulate its conception of federalism.*" L. TRIBE, AMERICAN CONSTITUTIONAL LAW at 156 (1978) (footnote omitted) (emphasis added).

B. The Contempt Order Violates The Separation Doctrine At Both The Federal And State Levels.

The separation of powers doctrine, wrote Chief Justice Warren,

> was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny. For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no men or group of men will be able to impose its unchecked will.

United States v. Brown, 381 U.S. 437, 443 (1965). *See also National Mutual Insurance Co. v. Tidewater Transfer Company, Inc.*, 337 U.S. 582, 590-91 (1949) (opinion of Jackson, J.). Judge Bechtle's contempt of court order, affirmed by the Third Circuit, imposes his "unchecked will" upon Pennsylvania's legislative and executive branches as well as the United States Congress.

Amici curiae are well aware that Justice Brennan, for a plurality of the Court, wrote "that the separation-of-powers principle ... has no applicability to the federal judiciary's relation-

ship to the States." *Elrod v. Burns*, 427 U.S. 347, 352 (1976). But *Elrod* is distinguishable from the present case on two grounds. There, the alleged judicial interference was the Supreme Court's review of the dismissal of non-civil-service employees, not the judicial intrusion into two branches of state government as here. And second, review in *Elrod* was necessary to vindicate the employees' First Amendment rights, whereas the federal court orders below were imposed to force state compliance with a consent degree.

The contempt order is a sweeping judicial usurpation of power. The order holds the Commonwealth of Pennsylvania and certain of its executive branch officials in contempt for failing to implement fully a consent decree with which they have made every possible good faith effort to comply. Moreover, it prevents those same officials from carrying out the orderly administration of highway planning and management. It holds the state's appropriations process hostage until such time as the legislative will as expressed in H.B. 456 gives way to Judge Bechtle's funding priorities. And it invades the Congress's constitutionally delegated power to establish post roads and to determine the conditions under which highway projects and grants will be awarded or withheld.

If it is true that "the only basis for separation is to identify the division of power that least reduces the general power of each branch, thus maximizing the potential in each of the competing branches for both independent action and interference," then the division here is decidedly skewed in favor of the federal courts. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 697 (1978). The author continues:

> The following proposition summarizes this general and implied standard used by the Court to give the greatest possible effect to two inconsistent organizational principles: With respect to two inconsistent claims for power, deny the claim that represents the greater intrusion into, but not necessarily a more effective "check" of, the classically or textually defined functions of the competing branch.

Id. at 697-98.

Applying the principle to *Rizzo*, the same commentator observed that

> The claims of the nonjudicial branches for control over the details of personnel and complaint procedures for the city's police department were, on the record, only a limited intrusion into the court's corrective powers when compared to the scope of the court's intrusion into the normal executive decision-making process.

Id. at 717. Here, transportation planning for the Pittsburgh and Philadelphia metropolitan areas will now be controlled by a federal judge—not those officials who have been delegated those duties. This is an alarming development, for "[e]ven the most 'forward' court would pause long and hard at the prospect of a judicial receivership over all the numerous state authorities and powers that would have to be marshaled to deal effectively with air...pollution problems." Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1264 (1977).

The separation doctrine protects the independence and defines the function of each branch of government. And as one commentator has observed:

> Application of the constitutional principle of separation of powers to the federal judiciary's relations with the states does not necessarily imply rejection of either reform-minded constitutional interpretations or innovative decrees. If separation principles are applied to limiting judicial *remedies*, it requires no assumption of judicial deference to the other branches' judgments regarding the *meaning* of the Constitution.

Nagel, *supra* at 724. This analysis is especially apt in this case, where no constitutional violations are even at stake. It is this Court that must define the limits of a federal court's equitable power when the exercise of that power encroaches upon the rightful functions of other state and federal branches of government.

CONCLUSION

Amici curiae request that this Court grant the Commonwealth of Pennsylvania's Petition for Writ of Certiorari for the following reasons: 1) To resolve the conflicts between the Third Circuit's decision and the decisions of four other circuits; 2) To resolve the conflict between the Third Circuit's decision and the decision of this Court in *Rizzo*; and 3) To settle the uncertain relationship of the federal courts' equitable power to the doctrines of federalism and separation of powers.

Respectfully submitted,

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Dated: September 16, 1982

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Brief of *Amici Curiae* were served this 16th day of September, 1982, on counsel for all parties of record by depositing the same in the United States Mail, First Class, postage prepaid, addressed as follows:

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